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Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1957.

JAY L. JONES, PAUL J. LIVINGSTON, JACK GOTT, LEO BRANTLEY JACKSON, JOHNNY E. COLE, JAMES RICHARD HARP, WILLIAM THOMAS PETERSON, OLIVER B. STEPHENS, JOHN E. McAFEE, T. MARTIN EDWARDS, ELMER LEE OAKLEY, JOHN DAVID HOOD, F. LEE JOHNSON, PAUL DONLEY RUCKER, and FRED A. GRIFFING, *Petitioners*,

vs.

UNITED STATES of AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1957

No.....

JAY L. JONES, PAUL J. LIVINGSTON, JACK GOTT, LEO BRANTLEY JACKSON, JOHNNY E. COLE, JAMES RICHARD HARP, WILLIAM THOMAS PETERSON, OLIVER B. STEPHENS, JOHN E. McAFEE, T. MARTIN EDWARDS, ELMER LEE OAKLEY, JOHN DAVID HOOD, F. LEE JOHNSON, PAUL DONLEY RUCKER, and FRED A. GRIFFING, ***Petitioners,***

vs.

UNITED STATES of AMERICA, ***Respondent.***

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable, The Supreme Court of the United States:

Come now the above named petitioners and respectfully petition this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit, and respectfully show:

A.

Opinion Below.

The opinion of the United States Court of Appeals for the Tenth Circuit has not yet been officially reported. Appended hereto are copies of the opinion and of the judgment order in cases 5678-5693, inclusive, in said court. (Appendix, pp. 45-60, 60-61)

B.

Jurisdiction.

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on January 6, 1958, and the court's opinion was filed by the clerk on said date. A petition for rehearing was duly and timely filed by petitioners on January 15, 1958, and was denied by the court on January 21, 1958. Jurisdiction of this Court is invoked under Title 28, U. S. Code, Section 1254 (1).

C.

Questions Presented.

1.

Under an indictment charging a *single* conspiracy, requiring a general verdict of "guilty" or "not guilty," does not the subterfuge of splitting such conspiracy into two purported "counts," each "count" charging one of the objects or "parts" of the conspiracy, followed by submission to the jury of the single conspiracy under instructions and forms of verdict requiring *separate "special" verdicts* of "guilty" or "not guilty" as each "count" or object, violate fundamental Due Process?

2.

As a matter of judicial policy, will this Court sanction adoption by the Federal courts of the odious concept of "implied crimes" or "implied conspiracies," thereby vastly extending the criminal jurisdiction of the Federal courts and usurping the jurisdiction of the State courts, by suffering a conspiracy to violate the laws of the United States to be *implied* upon the doctrine or "finding" of a "necessarily included conspiracy," as does the opinion of the Court of

Appeals, where the undisputed evidence clearly establishes a conspiracy, the sole object of which is a local police "protection payoff," operating wholly within the confines of the City of Tulsa, in violation only of the laws of the State of Oklahoma?

3.

Does not fundamental Due Process demand that a new trial be granted, where, in a mass conspiracy trial of eight days' duration, charging *only* a conspiracy to import liquor into a dry State and to evade payment of Federal liquor dealer taxes (which latter object the appellate court held was *wholly unsustained* by any evidence and *should not have been submitted* to the jury), some 117 of the 123 witnesses adduced testified concerning prostitution, gambling, graft and corruption, and innumerable, separate, ancient, uncharged, wholly unrelated and unconnected offenses and conspiracies spanning some eight years *prior* to the submitted conspiracy, and where the trial court, though clearly recognizing said testimony to be immaterial and prejudicial, refused to grant motions for a mistrial and for a new trial, and sought to *erase* the indelible prejudice permeating the trial by admonition and instruction to the jury, wholly ineffective and unavailing, "to disregard" virtually all of the evidence adduced?

D.

Constitutional Provisions and Statutes Involved.

This cause involves Constitutional provisions under the Fifth, Sixth and Tenth Amendments and statutory provisions under Title 18, U. S. Code, Sections 371 and 1262, and Title 26, U. S. Code, Section 5691. A vital question of

Federal criminal procedure is also involved. which, to the extent applicable, concerns the provisions of Rule 7 (c) of the Federal Rules of Criminal Procedure.

By virtue of the length of the foregoing provisions, the pertinent text has been set forth in an appendix, pp. 61-64.

E.

Statement of the Case.

1.

The Indictment.

By indictment returned in Case No. 12999, Criminal, in the United States District Court for the Northern District of Oklahoma, the grand jury charged that the twenty defendants had, on or about January 1, 1948, entered into an unlawful conspiracy among themselves and with twenty-one named co-conspirators and other persons unknown, in violation of Title 18, U. S. Code, Section 371, and that said conspiracy continued to on or about February 21, 1957. (R. 13-19)

While charging only a *single conspiracy*, the indictment was *separated into two "counts."*[1]

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1. Some three weeks prior to return of this indictment, the grand jury had, in Case No. 12993, Criminal, returned a "*one-count*" indictment against the same defendants charging the same offense. The prior indictment varied from the indictment in cause: (a) in charging inception of the conspiracy as on or about March 1, 1952; (b) in charging only 19 named co-conspirators; and (c) in charging the conspiracy in a single count.

Motions to dismiss the first indictment on various grounds, including "duplicity", were overruled, the indictment held valid, and the case set for trial. Notwithstanding same, the Government immediately caused the grand jury to return a new indictment—the indictment in this cause—for the evident purpose of *splitting* the conspiracy into separate "counts" and elected to proceed to trial on the latter indictment.

Count I charged that "It was a *part of the conspiracy* that the defendants would wilfully import intoxicating liquors * * *" into Oklahoma in violation of Title 18, U. S. Code, Section 1262, while Count II charged that "It was a *part of the conspiracy* that the defendants would carry on the business of wholesale and retail liquor dealers and wilfully fail to pay the special taxes therefor * * *" in violation of Title 26, U. S. Code, Section 5691. (R. 13-14, 18; italics ours.)

Motions to dismiss the indictment and each "count" thereof were overruled and trial was had before the court and a jury. Petitioners' motions for judgment of acquittal were overruled and the cause was submitted to the jury.

2.

The "Special" Verdicts.

Over objection of petitioners, the trial court submitted a *single conspiracy,* allegedly entered into on or about March, 1956, to the jury under instructions and forms of verdict requiring the jury to return *two separate verdicts*: (a) "guilty" or "not guilty" of count I (importation); (b) "guilty" or "not guilty" of count II (failure to pay tax).[2]

Pursuant to the instructions, the jury returned verdicts as to each "count" or object of the single conspiracy, finding petitioners guilty of count I but not guilty of count

2. R. 949-953, 958, 969-971.

For the convience of this Court, we have set forth the trial court's instructions pertinent hereto in an appendix, pp. 64-66, 68-70.

II of the conspiracy, except petitioners Martin Edwards and John Hood who were convicted on both counts.[3] Appropriate exceptions were taken to the verdicts and to each count thereof. (R. 57-62, 973-977)

3.

The March 1956 Conspiracy.

Though the indictment charged the existence of a conspiracy having its inception in January, 1948, the trial court held that the Government had failed to establish any conspiracy prior to March, 1956, and, in submitting the cause to the jury, the court limited the conspiracy charged to one entered into on or about March, 1956. (R. 866-867, 949-951)

Of the 123 witnesses in the 8 day trial, only Bill Edwards, a "bootlegger" desirous of controlling liquor in the City of Tulsa, and Charles Hirrlinger, a co-conspirator, testified as to the existence of the conspiracy, which had its inception in March, 1956, when Edwards, Hirrlinger and petitioner McAfee, a billiard parlor operator and reputably a gambler, conceived an unlawful scheme for exaction of tribute from liquor dealers or "bootleggers," and possibly from gamblers and prostitutes, under an arrangement for a City "protection pay-off." The scheme was to offer liquor dealers "protection" from enforcement by City law enforcement officials of State and City laws prohibiting sale

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3. On appeal, the U. S. Court of Appeals held that the trial court had erred in submitting the second count to the jury, as the evidence was insufficient to establish any agreement or conspiracy to fail to pay the federal taxes. The court accordingly reversed convictions of Edwards and Hood on Count II, but affirmed convictions of all petitioners as to count I. (Opinion, appendix, pp. 52, 60)

of liquor within the City of Tulsa in return for payments by the liquor dealers of specified monthly sums of money. (R. Edwards, 454-455; Hirrlinger, 557-560)

To effect such scheme, these three conspirators contacted petitioner Jones, a candidate for City police commissioner, and outlined the scheme to him. Jones needed money to satisfy obligations incurred in the campaign, accepted contributions made and obtained by them, and promised Edwards that he would be in charge of "collections" from liquor dealers if Jones were elected. It was agreed that after payment of expenses Jones was to receive one-half of the profits from the "pay-off," and that Edwards, Hirrlinger and McAfee would split the remaining half equally. (R., Hirrlinger, 558, 560-562; Edwards, 453-455, 458)

In the April 1956 elections, Jones was elected police commissioner and assumed the duties of such office in May. Thereafter, in May, 1956, Edwards and Hirrlinger met with petitioners Jones, Livingston, Gott and McAfee,[4] and the scheme for a City "protection fix" conceived by Edwards, Hirrlinger and McAfee crystalized into an unlawful conspiracy against the laws of the State of Oklahoma.

The conspiracy, as formulated by agreement of the six conspirators, provided for exaction of specified monthly sums of money from liquor dealers in the City, which money was to be collected by Edwards,[5] in return for free-

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4. At that time, Livingston was police chief and Gott was head of the vice squad.

5. Hirrlinger was to make collections, if any, from gamblers and prostitutes. The Record, however, does not disclose any such collections, and the trial court held that gambling and prostitution had not been connected with the liquor conspiracy. (R. 867) In fact, defendant Wells, a bail bondsman who posted bonds for prostitutes in the Municipal Criminal Court, through whom the Government sought to tie in prostitution, was acquitted on motion for judgment of acquittal at the close of the Government's evidence. (R. 119, 864, 866)

dom from raids, arrests and seizures of liquor by City law enforcement officials.[6]

The original "split" was revised, and, after payment of expenses,[7] Jones was to receive 40%, Livingston 20%, Gott 20%, defendant Bulloch[8] 10%, and the remaining 10% was to be split equally among Edwards, Hirrlinger and McAfee. (R., Hirrlinger, 562-564, 570, 571; Edwards, 455-456, 459-460, 530-531)

Edwards contacted Tulsa liquor dealers and offered "protection" if they paid the requisite monthly sums.[9] Upon payment, their automobile license numbers were relayed to Gott by Edwards, and Gott was to advise the vice squad members not to arrest drivers of those vehicles and not to seize liquor contained therein. Presumably, failure or re-

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6. The conspirators did not discuss "protection" against enforcement of Federal and State laws by Federal, State and County officials. The *sole object* of the conspiracy was to provide *immunity from City law enforcement* upon payment of tribute—to provide "city protection" against "raids and arrests and seizures by the Police Department * * * of the City". (R., Hirrlinger, 571; Edwards, 530-531, 455, 456, 460, 471) This was clearly established by the testimony of both Hirrlinger and Edwards.

7. Anticipated expenses included $500 a month for Livingston, $200 a month for each vice squad member, and $500 a month for a "mystery man" identified by Jones only as "a lawyer". The Record, however, does not disclose payment or receipt of any of these "anticipated" expenses.

8. Bulloch, a newspaper man described by the Government at the outset of the trial as the "conductor" of "A Streetcar Named Desire", the arch conspirator directing a conspiracy named Corruption, was acquitted by the trial court upon motion for judgment of acquittal at the close of the Government's case. The court held that the evidence as to Bulloch, who was not present at any of the meetings of the conspirators was insufficient to establish membership in the March 1956 conspiracy. (R. 151-153, 118-119, 864, 867-869)

9. Payments were obtained from numerous liquor dealers, including petitioners Oakley, Hood, Johnson, Rucker and Griffing.

fusal to pay the demanded "tribute" was to result in action by the vice squad in the form of raids and arrests. (R. 460, 472, 475)

Evidence was adduced which tended to show that raids and arrests were less frequent in 1956 and that less liquor was seized, but this condition was a general one existing without regard to whether or not liquor dealers had paid the requisite tribute. In fact, almost from inception of the conspiracy, the liquor dealers who voluntarily paid Edwards for "protection" complained incessantly that the dealers who were not paying were not being raided or arrested.[10] This condition existed throughout the short life of the conspiracy, and, in the numerous meetings of Edwards, Hirrlinger, McAfee and Jones in June, 1956, the three original conspirators endeavored to persuade Jones that he should cause increased raids on the non-paying liquor dealers. Edwards complained bitterly that as often as five days a week he would advise Gott which dealers had paid and which had not, and, while Gott assured him that the information had been communicated to the vice squad members, no action was taken by them. (R. 475, 485, 486, 565)

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10. There existed, in fact, a belief by the liquor dealers who had paid Edwards for "protection" that "they were being used as chumps" for "nobody was arrested, so the boys that voluntarily paid * * * were wondering why (they paid)." (R. 485)

In July, 1956, some sixty days after crystalization of the conspiracy agreement, Edwards and Hirrlinger withdrew and the conspiracy aborted.[11]

This conspiracy of March, 1956, which was the sole conspiracy submitted to the jury, was not a conspiracy to import liquor or a conspiracy to evade payment of the Federal taxes imposed on wholesale and retail liquor dealers. *There was no evidence of any agreement to import liquor or of any agreement to evade payment of the Federal taxes.*[12]

In fact, the appellate court held that *no agreement* to evade payment of the Federal taxes imposed on liquor dealers had been established and that the *trial court had erred*

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11. Edwards, Hirrlinger and Gott met in July 1956 to divide the tribute collected. The shares of Edwards, Hirrlinger and McAfee were each slightly in excess of $200. McAfee's share was delivered to his business establishment by Hirrlinger and was left on a desk. The Record does not disclose actual receipt of any money by McAfee. Gott, who was to receive 20 per cent, retained the remaining 90 per cent, presumably for distribution to Jones, Livingston and Bulloch, but the Record does not disclose receipt by them of any funds. (R. 479-480, 509, 566-568, 572)

12. The conspirators were not at all concerned with where or how the liquor dealers obtained their liquor or how they conducted their businesses. The dealers were free to obtain their liquor from whomever they desired, whether by importation or by purchase from other Oklahoma dealers. It was not a part of the conspiracy agreement that Bill Edwards, or any other person, would import the liquor to be sold in Tulsa. It was not mandatory that the liquor dealers buy their liquor from Bill Edwards or from any other person. These were individual business problems wholly outside the scope of the conspiracy agreement.

The conspirators simply did not discuss importation or the wholesale or retail sale of liquor. It was not part of their unlawful agreement. That liquor was sold or would be sold was wholly immaterial. Neither importation nor wholesale or retail sales of liquor were objects of the conspiracy. The fact of sale was a mere incidental fact which created an opportunity to demand and extract tribute as a cost of doing business. (R., Edwards, 471, 530-531; Hirrlinger, 570-571)

in submitting to the jury the *second count* of the indictment, which charged that it was an object of the conspiracy that wholesale and retail liquor businesses would be conducted and that the dealers would fail to pay the requisite Federal taxes.[13]

The agreement of these conspirators, shown by the record in the testimony of Charles Hirrlinger and Bill Edwards, co-conspirators, was an agreement for a City "protection pay-off," the sole object of which was the exaction of money as tribute in return for immunity from arrest under the unlawful "license" granted.[14]

That was the evidence adduced as to the March, 1956, Conspiracy!

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13. Opinion, U. S. Court of Appeals, appendix, p. 52.

Though finding no agreement to import liquor, the appellate court upheld convictions of petitioners for the charged conspiracy to import liquor. The Court held that the conspirators necessarily "contemplated" and "understood" that liquor would be imported, for "Without imported liquors, the combine would have no liquor business to control in Tulsa", and held that an agreement to import liquor must therefore be *inferred or implied* as a matter of law, even in the absence of an actual agreement of the conspirators. (Opinion, appendix, pp. 52, 54)

14. Hirrlinger testified:

"Q. * * * In other words, the plan was, there was to be a payoff from the liquor dealers * * * and having paid off they would be free, or assured freedom from raids, by the vice squad and raiding squads of the City Police Department?

A. Yes, sir.

Q. With reference to the liquor dealers, *who was to take care of the Federal Law Enforcement*, or was that discussed?

A. *That wasn't discussed.*

Q. Well, *the idea was to get the liquor dealers*—

A. *The city protection.*

Q. Against raids and arrests and seizures by the Police Department, the raiding squad or the police department of the City, that's right, isn't it?

A. That's right." (R. 571; italics ours)

And Edwards similarly limited the conspiracy by his testimony:

4.

Separate Unrelated Conspiracies.

Two witnesses testified as to the existence of the March 1956 conspiracy, and four other witnesses testified to corroborate Edwards' testimony as to the fact of "pay-offs" to Edwards.

Footnote 14 Continued

"Q. * * * Subsequent to March 30, 1956, I * * * ask you if during the month of May you had occasion to meet with Jay Jones, Paul Livingston, Jack Gott, Charles Hirrlinger and Johnny McAfee.

A. Yes, sir.

* * * * * *

Q. Will you relate * * * the substance of that conversation had in May?

A. Yes, sir, the substance of the conversation concerned this *protection fix* thing, that we set up.

* * * * * *

Q. * * * under this arrangement at the meeting there was it discussed how the protection fix as you call it was to operate?

A. Yes, sir.

Q. And how as it to operate?

A. I was to contact these bootlegers * * * and let them know that I could help them of they needed some help in getting along in their business; and if they didn't cooperate with me by paying me * * * $100 a car, or a minimum of $200, then they were reported to the vice squad and those boys were to be picked up.

* * * * * *

Q. *And was it part of this agreement that you were to sell to the liquor dealers that you were picking up from?*

A. It wasn't— *it wasn't mandatory* that they buy from me * * * they could trade with whoever they wanted to.

Q. Did most of them trade with you?

A. No, * * * no, they didn't * * *

* * * * * *

Q. * * * what were the liquor dealers to receive?

A. Oh, *they were to receive absolute police protection.*

Q. In other words, protection against arrests, search and seizure, by the raiding squad?

A. Yes, sir * * *

Q. In other words, the understanding was that the liquor dealers in Tulsa would be—who were paying off through you would be operating with an assurance that they wouldn't be knocked off by the raiding squads of the police department?

A. Yes, sir.

* * * * * *

However, virtually all of the testimony of the 123 witnesses adduced in the eight day trial concerned separate, unrelated, ancient conspiracies, offenses, acts and transactions, and other immaterial evidence, covering some eight years prior to the charged March, 1956 conspiracy.[15]

Footnote 14 Continued

Q. And that those liquor dealers who were not paying off would be raided and searched and arrested with a view of coercing them into joining into this arrangement,—am I stating it right?

A. That's true, that's right.

• • • • • •

Q. • • • *Were you paying any protection to the Oklahoma Highway Patrol* against seizure of automobiles on the highways?

A. No, sir.

Q. *No other department of Government?*

A. No, sir.

Q. *You took your chances with the Highway Patrol and with the Federal Officials?*

A. Yes, sir." (R. 455, 456, 460, 471, 530, 531; italics ours)

15. Exemplary of the mass of irrelevant, immaterial and prejudical testimony adduced was evidence concerning the following separate, unrelated conspiracies, offenses, acts and transactions, primarily prior to the March 1956 conspiracy but also including some unrelated conspiracies and transactions subsequent thereto:

(a) The 1948 "pay-off" conspiracy of Epps and defendant Bulloch (R. 169-173, 189, 197, 164-169, 198-201, 202-204, 212, 231-233);

(b) The 1953 conspiracy of Epps and defendant Bulloch (R. 174-177, 210-212, 213-214, 214-216, 614-615);

(c) The 1950-1952 "pay-off" conspiracy of Boone, Carter (an admitted perjurer), and Graves (R. 218-231, 233-236, 239-242, 242-248, 253-255, 379-380, 380-387, 573-578);

(d) The July 1956 "pay-off" conspiracy of Moore and petitioner Peterson (R. 690-694, 700-701);

(e) The July 1956 "pay-off" conspiracy of Massey and petitioner Martin Edwards (R. 745-762, 765-771, 775-776, 707-712, 715-716);

(f) The 1953-1956 purchases of liquor by Bill Edwards from defendant Gray and the September or October 1956 "importation conspiracy" between Gray and Bill Edwards (R. 317-322);

(g) The 1951 liquor transactions between Moore and defendant Gray (R. 304-306, 309, 310-311);

(h) The 1952-1956 wholesale and retail sales of liquor by petitioner Martin Edwards (R. 687-688, 688-689, 720-723, 739-741, 744, 754-755, 760, 763, 702-703, 326-327);

(i) Importation of liquor in 1948, 1949, 1950, and early 1951, when the Federal Liquor Enforcement Act was not applicable to Oklahoma and it was not lawful to import liquor (R. 259-263, 299-302, 302-304, 311-316, 316-317);

F.

Jurisdiction in First Instance.

Jurisdiction of the trial court is derived from the provisions of Title 18, U. S. Code, Section 3231, and was invoked by the return of an indictment by a Federal grand jury charging an unlawful conspiracy against the laws of the United States in violation of Title 18, U. S. Code Section 371.

Footnote 15 Continued

(j) Importation of liquor in 1951, 1952, 1953, 1954, 1955, and pre-March 1956, prior to the March 1956 conspiracy, constituting separate unrelated substantive offenses (R. 304-306, 309-311, 317-322, 322-324, 326-328);

(k) The arrest of one Carl Harp, who was not charged as a defendant or co-conspirator, by A. T. U. investigator Burns in Missouri in 1953 (R. 268-271, 273-274, 388-390);

(l) The arrest of one Lefty Anderson by A. T. U. investigator Starrett in Missouri on April 23, 1955 (R. 283-284);

(m) The arrest of one Robert Faucet by A. T. U. investigator Starrett on May 14, 1956, in Kansas (R. 284-285);

(n) The arrest of "runners" for petitioner Johnson by officer Carter at unspecified times and places (R. 587-588);

(o) The arrest of one Paul Neal by investigator Starrett in Missouri on January 11, 1957 (R. 287-288);

(p) The arrest of petitioner Griffing by A. T. U. investigator Starrett in Kansas in 1956 (R. 286-287);

(q) The arrest of petitioner Oakley by officer Carter at an unspecified time and place (R. 587);

(r) The arrest of petitioner Hood by officer Carter at an unspecified time and place (R. 588);

(s) The stopping of defendant Gray in Missouri by A. T. U. investigator Starrett on November 5, 1956, and Starret's testimony that Gray had 60 cases of whiskey with him (R. 285-286);

(t) The isolated sale of one lug of half-pints of gin by petitioner Peterson to Moore in 1953 (R. 604-606, 607-608);

(u) Payment or non-payment of Federal taxes imposed on retail and wholesale liquor dealers in 1948, 1950, 1951 and 1952 (R. 401-413).

G.

Reasons Relied On for Allowance of the Writ.

1.

Special Verdicts.

(a)

The opinion of the United States Court of Appeals for the Tenth Circuit, in the cause below, is in direct conflict with the decision of the United States Court of Appeals for the Eighth Circuit in *Gray* v. *United States*, 174 F. 2d 919, cert. den. 338 U. S. 848, 70 S. Ct. 90, 94 L. ed. 519.

(b)

The court below has decided an important question of Federal criminal procedure which has not been, but should be, settled by this Court:

Are *special verdicts* authorized in Federal criminal prosecutions?

In the prosecution of a *single conspiracy*, charging several objects, some of which as substantive offenses are felonies and some misdemeanors, *is the trial court empowered*, over objection of a defendant, to require the return by the jury of special verdicts, or separate verdicts of "guilty" or "not guilty" as to each object or "part" of the single conspiracy?

(c)

By sanctioning the novel and unprecedented action of the trial court in requiring special verdicts as to a single conspiracy charged, over objection of the defendants, the United States Court of Appeals permitted a departure from established Federal criminal procedure so great in character and effect upon the substantive rights of the defendants as to constitute a denial of fundamental Due Process

and to call for an exercise of this Court's power of supervision.

(d)

The failure of Congress, in enacting the new Federal conspiracy statute, Title 18, U. S. Code, Section 371, to visualize the perplexities of judicial administration created by prescribing different maximum punishments for conspiracies with a felony object or objects and conspiracies to commit misdemeanors only, created a dilemma which has resulted in an ever-broadening area of conflict and confusion.

The statute provides, in pertinent part:

> "If, however, the offense, the commission of which is the *object* of the conspiracy is a *misdemeanor only*, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." (Italics ours.)

Where the indictment seeks to charge a single conspiracy with multiple objects, some of which as substantive offenses are felonies and some misdemeanors, how must or may the conspiracy be charged, tried and submitted to the jury?

Absent guidance by statutory enactment, Rule of Criminal Procedure, or decision by this Court, Federal trial courts, prosecutors, defendants and the Federal Bar have, with the increased utilization of multiple-object conspiracy prosecutions since 1948, floundered on a sea of perplexities in endeavoring, within the framework of existing criminal procedure, to effect presumed Congressional intent.[16]

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16. Exemplary of the multitudinous quandaries created by the new conspiracy statute are:

A. The indictment—

1. Must the single conspiracy be charged in a single count?

Clearly involved in every Federal criminal conspiracy prosecution, where felony and misdemeanor objects of a single conspiracy are charged, are the noted, unresolved questions of Federal criminal procedure,[17] national in extent and vital in character.

Footnote 16 Continued

2. May the single conspiracy be charged in several "counts", the felony objects being charged in one "count" and the misdemeanor objects in another "count"?
3. May a defendant be tried upon an indictment, which, *over his objection*, splits the single conspiracy into several "counts", separating the felony and misdemeanor objects?

B. The verdict—

1. Must only one general verdict of "guilty" or "not guilty" of the single conspiracy charged be returned?
2. May several "special verdicts" be returned as to a single conspiracy charged, in order to determine whether the evidence established the existence of a felony object or whether the conspiracy, though charging a felony object, was in fact, a conspiracy to commit a misdemeanor only?
3. May a defendant obtain upon request "special verdicts" as to the objects of the multiple-object, single conspiracy charged?
4. May "special verdicts" be submitted to the jury, where a multiple-object, single conspiracy is charged, *over objection* of a defendant, who, fearing a *compromise verdict* of guilty of conspiracy to commit a misdemeanor but not guilty of conspiracy to commit a felony, *demands* the return of a single general verdict of "guilty" or "not guilty" of the single conspiracy charged?

C. Punishment—

1. Upon the return of a general verdict of "guilty as charged" of a multiple-object, single conspiracy, some of the objects of which are felonies and some misdemeanors, how may the trial court determine the imposition of punishment?
2. After a general verdict of "guilty as charged" of a multiple-object, single conspiracy, where both felony and misdemeanor objects were charged, must the trial court weigh the evidence to determine if sufficient evidence was adduced to sustain a finding of guilty of a conspiracy to commit one of the felony objects before the court may impose punishment as for a felony?
3. Will the charging of a single conspiracy to commit several objects, misdemeanors and felonies, justify imposition of punishment as for a felony, upon a general verdict of "guilty as charged," where the Record is wholly devoid of any evidence establishing that any of the charged felony objects were objects of the conspiracy?
4. If, over objection of the defendants, special verdicts may be required and returned as to a multiple-object, single conspiracy charged, may the court impose punishment on the findings of "guilty" of only half or "part" of the single offense charged?

17. See Footnote 16, *supra*.

Federal trial judges are required to weigh and balance the asserted right of the defendant to have but one general determination by a jury of his guilt or innocence of the single, indivisible, charged offense of conspiracy, against assumed or presumed Congressional "intent" in enactment of the "misdemeanor punishment" provisions.

The gravity of the absence of a definitive determination of the duties and powers of Federal trial courts in multiple-object conspiracy prosecutions is most vividly demonstrated by the hopeless confusion and conflict existing not only in the district courts but in the Courts of Appeals. (See Argument, Part "H," *infra*, pp. 24-30)

The orderly admin stration of justice has been seriously hampered; constitutional rights and guarantees under the Fifth and Sixth Amendments have been abrogated by "novel innovations" of criminal procedure; and the "backbone" of our courts—public confidence—is being undermined. The remedy lies not alone in Congress, for Federal trial courts must nonetheless endeavor to administer justice under existing Statutes and Rules of Criminal Procedure.

For the benefit of the Federal Bench and Bar, and the general public, this Court should resolve the conflict and confusion and declare a rule of uniform practice and procedure in such conspiracy prosecutions.

2.

Implied Crimes.

(a)

By its adoption of the pernicious and odious doctrine of *implied crimes and implied conspiracies*, the opinion of

the United States Court of Appeals for the Tenth Circuit, in the cause below, is in direct conflict with long-established conspiracy principles, and is in direct conflict with prior decisions of this Court, denouncing implied, presumed and constructive crimes or conspiracies, including the decisions of this Court in *Grunewald* v. *United States,* 353 U. S. 391, 77 S. Ct. 963, 1 L. ed. 2d 931, and *Krulewitch* v. *United States,* 336 U. S. 440, 69 S. Ct. 716, 93 L. ed. 593.

(b)

In creating and finding an implied agreement and conspiracy, predicated upon the pyramiding of inference upon inference, contrary to the actual intent and agreement of the conspirators, the opinion of the court below is in direct conflict with prior decisions of this Court, including decisions in *Direct Sales Co.* v. *United States,* 319 U. S. 703, 63 S. Ct. 1265, 87 L. ed. 1674, and *United States* v. *Falcone,* 311 U.S. 205, 61 S. Ct. 204, 85 L. ed. 128.

The opinion of the United States Court of Appeals for the Tenth Circuit, in the cause below, is further in direct conflict with the decision of the United States Court of Appeals for the Second Circuit in *United States* v. *Dellaro,* 99 F. 2d 781; the decision of the Third Circuit in *United States* v. *Russo,* 123 F. 2d 420; the decision of the Fifth Circuit in *Rent* v. *United States,* 209 F. 2d 893; and prior decisions of the Tenth Circuit in *Thomas* v. *United States,* 57 F. 2d 1039, *Bacon* v. *United States,* 127 F. 2d 985, and *Gerson* v. *United States,* 25 F. 2d 49.

(c)

In finding the existence of a conspiracy against the United States, predicated upon evidence establishing, at most, a conspiracy for a local City "protection pay-off," solely in violation of the laws of the State of Oklahoma, thereby extending Federal jurisdiction over State crimes, contrary to the mandate of the Tenth Amendment, the opinion of the court below is in direct conflict with the decision of the United States Court of Appeals for the Fourth Circuit in *Walker* v. *United States,* 104 F. 2d 465; the decision of the Fifth Circuit in *Railton* v. *United States,* 127 F. 2d 691; the decisions of the Ninth Circuit in *Rossi* v. *United States,* 49 F. 2d 1, and *Weniger* v. *United States,* 47 F. 2d 692; and the prior, controlling decision of the Tenth Circuit in *Wilder* v. *United States,* 100 F. 2d 177.

3.

Fair and Impartial Trial.

(a)

The opinion of the United States Court of Appeals for the Tenth Circuit, in the cause below, is in direct conflict with the decision of this Court in *Kotteakos* v. *United States,* 328 U. S. 750, 66 S. Ct. 1239, 90 L. ed. 1557, and the test of prejudice therein decreed.

(b)

In holding that admission of innumerable, wholly unrelated, separate, uncharged conspiracies and offenses, including evidence of prostitution and gambling, did not constitute prejudice and did not deprive defendants of a fair and impartial trial, the opinion of the court below is in direct conflict with the decisions of this Court in *Boyd* v.

United States, 142 U. S. 450, 12 S. Ct. 292, 35 L. ed. 1077, and *Michelson* v. *United States,* 335 U. S. 469, 69 S. Ct. 213, 93 L. ed. 168.

The opinion of the court below is further in conflict with the decision of the United States Court of Appeals for the Second Circuit in *United States* v. *James,* 208 F. 2d 124; the decisions of the Fourth Circuit in *Lovely* v. *United States,* 169 F. 2d 386, and *Walker* v. *United States,* 104 F. 2d 465; the decision of the Fifth Circuit in *Helton* v. *United States,* 221 F. 2d 338; the decision of the Eighth Circuit in *Hartman* v. *United States,* 215 F. 2d 386; and the prior decision of the Tenth Circuit in *Coulston* v. *United States,* 51 F. 2d 178.

H.

Argument.

1.

Special Verdicts.

(a)

While praiseworthy in its intended purpose of ameliorating the harshness and unfairness of the existing law, wherein misdemeanors were, in effect, "converted" or "upgraded" to felonies by utilization of conspiracy indictments,[18] the action of Congress in repealing the former con-

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18. This Court is thoroughly cognizant of the efforts of the Bench and Bar in seeking amendment of the former Statute. In 1925, the Report of the Conference of Senior Circuit Judges strongly, but "unvailingly", protested against the abuses inherent in the prevalent use of conspiracy prosecutions, particularly in utilization of "conspiracy indictments for converting a joint misdemeanor into a felony." See *Krulewitch* v. *United States,* 336 U. S. 440, 446, 69 S. Ct. 716, 719, 720, 93 L. ed. 593 (Concurring opinion, Mr. Justice Jackson, note 2), wherein portions of the Report are quoted, and the Annual Report of the Attorney General for 1925, pp. 5-6.

Under the prior Statute, conspiracies to commit offenses against the laws of the United States were punishable as felonies, though the object of the conspiracy may have been a mere misdemeanor. The authorized imposition of a greater punishment for the unlawful

spiracy statute, Title 18 U. S. Code, Section 88, and in enacting the present statute, Title 18, U.S. Code, Secton 371, created a multitude of new, perplexing problems, clearly not foreseen by Congress, which today vitally affect sound judicial administration in Federal criminal conspiracy prosecutions.[19]

The present conspiracy statute, Title 18, U. S. Code, Section 371, provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such conspiracy."

(b)

On February 9, 1957, in a prior cause, the grand jury returned an indictment charging petitioners, and others, in a *single* count, with an unlawful conspiracy, in contravention of 18 U. S. C. 371, *supra*, the objects of which were:

Footnote 18 Continued

agreement to commit a minor offense than for the actual commission of the offense was a concept foreign to American standards of justice and fairness and provided a prime topic for comment and criticism by the Bench and Bar in the several decades preceding repeal of the Statute. See, *e. g., Address of the Hon. Grover M. Moscowitz*, Judge, United States District Court for the Eastern District of New York, 3 F.R.D. 380, 391.

19. See Reasons Relied on for Allowance of the Writ, part 1 (d), pp. 16-18. and particularly Footnote 16, *supra*, pp. 16-17, wherein some of the many problems created by the new Statute are set forth.

(a) to import liquor into dry Oklahoma, in violation of 18 U. S. C. 1262, and (b) to carry on the businss of wholesale and retail liquor dealers and willfully fail to pay the requisite Federal taxes therefor, in violation of 26 U. S. C. 5691.

To such indictment, motions to dismiss were filed, asserting numerous grounds including the objection that the indictment charged two distinct conspiracies within a single count and was duplicitious. In March, 1957, argument was had before the court, and it was held that only one offense —a single conspiracy—was charged, and the fact that said conspiracy had several objects did not constitute a charge of several conspiracies. The indictment was held valid and the cause ordered set for trial.

Virtually immediately thereafter, the Government caused the grand jury to return a second indictment, which indictment was returned in this cause on March 15, 1957, charging, in all material respects, the *same single conspiracy*, but *splitting* the single offense into "parts" and charging each "part" or object in separate purported "counts"!

In count I, the indictment charged that "It was a *part of the conspiracy* that defendants would wilfully import intoxicating liquors into the State of Oklahoma * * *" in violation of 18 U. S. C. 1262. (R. 13-14; italics ours.)

And, in count II, the indictment charged that "It was a *part of the conspiracy* that the defendants would carry on the business of wholesale and retail liquor dealers and wilfully fail to pay the special taxes therefor * * *" in vioation of 26 U. S. C. 5691. (R. 18; italics ours.)

Motions to dismiss this second indictment, and each purported "count" thereof, were filed, challenging the indictment on various grounds, including the objection that, on its face, the indictment sought to charge but a single conspiracy and attempted to split the offense into "parts," thereby failing to charge in either "count" the complete conspiracy sought to be charged, contrary to the interdiction of the Sixth Amendment. (R. 22-25, 31, 32, 36, 40, 41, 45-46)

The motions were overruled, the second indictment held valid, and the cause set for trial. Thereupon, the Government dismissed the first indictment, and trial was had upon the two "count" second indictment.

Though holding that the indictment charged but a single conspiracy in violation of the conspiracy statute, 18 U.S.C. 371, the trial court refused to permit the return of a single general verdict of "guilty" or "not guilty" and submitted the cause to the jury, over objection of the defendants, under instructions, and with forms for verdicts, requiring the return by the jury of separate "special verdicts" of "guilty" or "not guilty" as to the two "parts" or objects of the conspiracy![20]

The submission of the unprecedented forms for special verdicts, and the denial to the defendants of their fundamental and Constitutional right to a single general verdict of "guilty" or "not guilty" of the single conspiracy charged, constituted a violation of fundamental Due Process! *Gray* v. *United States,* (8 Cir.) 174 F. 2d 919, cert. den. 338 U. S. 848, 70 S. Ct, 90, 94 L. ed. 519.

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20. The trial court's instructions to the jury are, with a form of the verdict submitted, reproduced in an appendix pp. 64-66, 68-70.

In *Gray,* each of the four counts charged a separate offense of introducing and delivering for shipment in interstate commerce a misbranded article in violation of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. 331 (a), *et seq.*, and charged numerous specific ways in which the misbranding was allegedly accomplished. Over objection of the defendant, the trial court submitted forms for special verdicts as to each count and required special findings as to the manner in which the misbranding was accomplished.

Denouncing the submission of special verdicts as unprecedented and "an innovation in American criminal practice," the Eighth Circuit held that the departure from established criminal procedure constituted a denial of Due Process and necessitated reversal of the conviction (174 F. 2d 919, 923, 924):

> "* * * (Appellant) contends * * * there was no power or discretion in the court to require * * * verdicts * * * in the nature of * * * special interrogatories and answers thereto * * * permissible in civil actions but which have no place in criminal procedure. His position is * * * that upon the plea of not guilty the only issue for the jury joined by the charge * * * and the plea is the *general issue* of 'guilty' or 'not guilty,' and that the jury must be required to respond to that issue by a *general verdict.* * * *
>
> "* * * counsel again asserts * * * he has found 'no statute, Rule of Criminal Procedure or precedent of decision' sanctioning the delivery of such a form of verdict to the jury for the purpose of returning their verdict in a criminal case * * *. We think, as stated by the court in *Anderson* v. *United States,* 9 Cir., 273 F. 677, 679, that 'it is not the practice of the federal courts in criminal cases to call for special verdicts.' * * * And

> we are constrained to conclude that *the delivery of these forms to the jury and the direction to fill them out with several declarations of guilty or not guilty* * * * *present an innovation in American criminal practice.* * * * The vesting of discretion in the trial court * * * in civil actions * * * by Rule 49 * * * is no indication of authority to use it in criminal trials. In such trials *the practice has been settled* time out of mind to charge but one crime in one count, to accept but one general plea to it and *to call upon the jury to make but one general response, guilty or not guilty.* Such established procedure was obviously departed from here over appellant's objection and it may not be held that such a departure did not affect appellant's substantial right to be tried according to law. It is not the function of the courts subordinate to the Supreme Court to introduce innovations of criminal procedure. The action of the court requiring the special verdicts duly excepted to by appellant constituted error." (Italics ours.)

The submission to the jury by the trial court in this cause of special verdicts denied to the defendants their fundamental right to a single, general verdict and is diametrically opposed to the holding of the United States Court of Appeals for the Eighth Circuit in *Gray* v. *United States, supra.*

It is not surprising that the unauthorized submission of special verdicts, requiring separate declarations by the jury of "guilty" or "not guilty" as to each "part" or object of the single conspiracy, thereby permitting *compromise verdicts,* in fact resulted in the compromise verdicts as to 14 defendants, who were found *guilty of that part* of the conspiracy which charged as an object importation of

liquor into dry Oklahoma, a misdemeanor, and *not guilty of that part* of the conspiracy which charged as an object willful failure to pay Federal liquor dealer taxes, a felony.

Query: Are not partial verdicts of guilty of part only, and not guilty of part, of a single, indivisible offense, in law, verdicts of not guilty?

By its holding affirming the submission of special verdicts, the decision of the Tenth Circuit, in the cause below, is irreconcilably in conflict with the decision of the Eighth Circuit in *Gray* v. *United States, supra.*

Truly astounding is this Tenth Circuit holding in view of the court's further holding that there was *no evidence* to establish *any agreement or conspiracy* to fail to pay Federal liquor dealer taxes and that the trial court had *erred in submitting* the second count of the conspiracy to the jury!

Is Due Process afforded a defendant by subjecting him to the oppression, confusion and danger of compromise inherent in the separate submission of partial verdicts as to each of two alleged "parts" of a single alleged offense, when, as a matter of law, the evidence excludes the existence of one of the "parts"?[21]

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21. The situation is analogous to the erroneous submission by the court of an instruction on voluntary manslaughter in a murder case, where the evidence raises but two issues: Guilty of murder as charged, or not guilty by reason of self-defense. The possiblity exists, and it frequently occurs, that a compromise verdict of guilty of voluntary manslaughter results, though, if faced with the determination solely of guilt or innocence of the single offense of murder charged and in issue, acquittal might have resulted. Such erroneous injection of an offense not charged, or necessarily included therein, and *in issue* under the evidence clearly constitutes reversible error.

In considering the question of the power or authority of a Federal district judge to submit special verdicts in Federal criminal prosecutions, the decisions of the various United States Courts of Appeal are in hopeless and irreconcilable conflict.

We have noted the holding of the Eight Circuit in *Gray* that the submission of special verdicts in a Federal criminal prosecution is unprecedented and constitutes such a departure from established procedure as to violate Due Process.

Diametrically in conflict is the decision of the Tenth Circuit in the cause below, affirming and approving the utilization of special verdicts, in lieu of general verdicts, though over objection of the defendants.

Also in conflict with the Tenth Circuit holding is the decision of the Ninth Circuit in *Anderson* v. *United States,* 273 Fed. 677, cited and approved by the Eighth Circuit in *Gray*. While *Gray* does not decide whether the court has the power to submit special verdicts, *if requested by the defendant, Anderson* holds that the refusal of a defendant's request of a special verdict or special findings is not error.

The gratuitous footnote *obiter dicta* of the Fifth Circuit in *Williams* v. *United States,* (5 Cir.) 238 F. 2d 215, 217, 218, cert. den. 352 U. S. 1024, 77 S. Ct. 589, 1 L. ed. 2d 596, more than any other cause, has served to cloud and confuse this segment of the law of conspiracy, and is undoubtedly responsible for the erroneous action of the trial court in the cause below.

In *Williams,* the issue of special verdicts was not before the court and its holding was merely that the *failure* of the *defendant to request* a special verdict, where the conspiracy charged felony and misdemeanor objects constituted

a *waiver* of any objection which he might have to a general verdict and to punishment as for a felony upon the return of a general verdict of guilty.[22]

Presumably for the "guidance" of lower Federal courts, the court in *Williams* voluntarily observed that the dilemma of punishment under the conspiracy statute could be circumvented by charging the felony objects and the misdemeanor objects in separate counts. However, the court made no suggestion as to how the conspiracy was to be submitted to the jury and did not suggest abrogation of general verdicts or utilization of special verdicts in cases where the defendant objected to their use.

Clearly, the court's dictum in *Williams* merely compounded the confusion!

A *fifth divergent view* is presented in *United States* v. *Ogull,* (D. C. S. D. N. Y.) 149 F. Supp. 272! The prosecution in *Ogull* was for "unlawful trafficking" *in narcotics* and for conspiring so to do between April and September, 1956. On July 19, 1956, 21 U. S. C. 174 was amended to increase the maximum punishment for such conspiracies. The evidence presented an issue of continued membership in the conspiracy after the effective date of the amendment, which, if established, would authorize imposition of the increased punishment provided by the amendatory act.

In *Ogull,* contrary to the decision of the Tenth Circuit, the trial court recognized the fundamental right of the de-

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22. Appellant in *Williams* in fact conceded that the evidence was sufficient to sustain findings of the existence of each of the seven charged objects as objects of the conspiracy. His argument was simply that the court could not know whether the jury had found the existence of a felony object, and therefore the court should not punish as for a felony.

fendant to have his guilt or innocence determined by a general verdict and submitted a general verdict to the jury. However, to determine imposition of punishment *after conviction*, if verdicts of guilty were returned, the court submitted special verdicts for findings as to membership of each defendant in the conspiracy after a specified date. No objection to this procedure was raised by the defendants or the Government.

Even this compromise view lacks approval by statute, rule, or decision of this Court. *Must* the trial court, prior to imposition of punishment as for a felony, submit special verdicts to the jury, after conviction upon a general verdict of guilty of a charged conspiracy with alleged felony and misdemeanor objects, in order to determine whether the jury found the existence of a felony object? *May a defendant, by request, compel* the submission of special verdicts after conviction by the jury's general verdict of guilty as charged, in order to obtain the benefit of the misdemeanor provisions of the conspiracy statute?[23]

The 1948 revision of the Federal conspiracy statute created a dilemma which has perplexed and will continue to perplex appellate and trial courts, prosecutors, defendants and counsel. With the growing use of Federal conspiracy indictments, the confusion and conflict will inevitably be-

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23. What did Congress mean by a conspiracy to commit a misdemeanor only? Can the intent of Congress be thwarted by merely charging a felony object as to which no evidence is adduced or intended to be adduced? Must the evidence establish the existence of a felony object to justify punishment as for a felony? How may the courts determine the existence of a felony object in a conspiracy charging felony and misdemeanor objects?

come more acute. Inherent in *every* Federal conspiracy prosecution charging felony and misdemeanor objects are the previously noted problems of a proper indictment, authority for special verdicts before and after conviction, and determination by the court of the maximum sentence imposable.[24]

The problem is of grave national importance in preserving sound administration of justice in the lower Federal courts. It presents vital questions of "first impression" as to Federal criminal procedure which require and are deserving of declaration by this Court of a Rule of uniform practice and procedure in such conspiracy prosecutions.

2.

Implied Crimes

> "* * * *Few instruments of injustice can equal that of implied or presumed or constructive crimes. The most odious of all oppressions are those which mask as justice.*"
>
> *Krulewitch* v. *United States,* 336 U. S. 440, 457-458, 69 S. Ct. 716, 725, 93 L. ed. 593 (concurring opinion, Mr. Justice JACKSON; italics ours).

The opinion of the United States Court of Appeals for the Tenth Circuit, in the cause below, is in direct and irreconcilable conflict with prior decisions of this Court in *Krulewitch* v. *United States, supra,* and *Grunewald* v. *United States,* 353 U. S. 391, 77 S. Ct. 963, 1 L. ed. 2d 931.

In embracing and adopting the odious doctrine of implied crimes and implied conspiracies, foreign to our traditional philosophy of the non-existence of crimes against

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24. See Footnote 16, *supra,* pp. 16-17.

the United States except as denounced by statute and of the necessity for strict construction of criminal statutes, the opinion of the court below threatens the very fabric and framework of American criminal jurisprudence.

Though finding an agreement and conspiracy for a local City "protection pay-off," *solely* in violation of the laws of the State of Oklahoma, the court below *implies, creates and superimposes* an agreement and conspiracy to import liquor into dry Oklahoma, in violation of Federal law, by pyramiding inference upon inference.

> "The record * * * establishes a conspiracy * * *. We also think that the evidence shows that the combination from its inception *contemplated* the unlawful importation of intoxicating liquor into Oklahoma. * * * Without imported liquors, the combine would have had no liquor business to control in Tulsa.
>
> * * * * * * * *
>
> "* * * The *inference* is inescapable that it was *understood* that a substantial portion of the liquor to be disposed of in Tulsa was to be imported by one of the conspirators * * *." (Opinion, pp. 11, 13, 14, appendix, pp. 52, 54; italics ours.)

Thereby, the court below *judicially creates an implied conspiracy* different and broader in scope, character and content than the conspiracy established by the evidence and contrary to the actual agreement and conspiracy of the conspirators!

Clearly, this is in direct conflict with the holding of this Court in *Direct Sales Co.* v. *United States,* 319 U. S. 703, 711, 63 S. Ct. 1265, 1269, 87 L. ed. 1674.[25]

> "* * * charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in * * * (*United States* v. *Falcone,* 311 U. S. 205, 210, 61 S. Ct. 204, 206, 85 L. ed. 128) was called a drag-net to draw in all substantive crimes." (Parenthetical interposition ours.)

The "implied agreement" to import liquor is wholly unsustained by the Record, and is contrary to the testimony of Hirrlinger and Edwards, the sole witnesses testifying relative to the conspiracy agreement. Their testimony affirmatively established that importation was *neither considered nor discussed!* The *sole object* of the conspiracy was the unlawful exaction of tribute from City liquor dealers in return for failure of City Police officials to enforce the laws of the State of Oklahoma and the City of Tulsa prohibiting the sale of liquor within this dry State.[26]

The "inferences" which the court below draws, are without foundation in the Record and are contrary to the evidence adduced. The court, in effect, *implies as a matter*

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25. The holding of the Tenth Circuit is also in direct conflict with the decision of the Second Circuit in *United States* v. *Dellaro,* 99 F. 2d 781; the decision of the Third Circuit in *United States* v. *Russo,* 123 F. 2d 420; the decision of the Fifth Circuit in *Rent* v. *United States,* 209 F. 2d 893; and prior decisions of the Tenth Circuit in *Thomas* v. *United States,* 57 F. 2d 1039, *Bacon* v. *United States,* 127 F. 2d 985, and *Gerson* v. *United States,* 25 F. 2d 49.

26. See: Part E (Statement of the Case: The March 1956 Conspiracy), pp. 6-11, and particularly Footnotes 6, 12, 14 *supra,* pp. 8, 10, 11-13, for the pertinent testimony of Charles Hirrlinger and Bill Edwards.

of law the existence of an agreement and conspiracy of *these conspirators* to import liquor into Oklahoma![27]

This is truly an "ominous expansion of the accepted law of conspiracy"! *Krulewitch* v. *United States, supra.*

Directly in point and controlling of this cause is the prior decision of the court below in *Wilder* v. *United States,* 100 F. 2d 177, 183, holding that proof of an agreement for a "protective pay-off" in which county law enforcement officers would fail to enforce the State prohibitory liquor laws constituted, at most, an unlawful conspiracy to violate the laws of the State, and, as a matter of law, constituted no violation of Federal law.

> "It is unnecessary to express an opinion here as to whether the evidence proved a conspiracy to violate the laws of the State of Oklahoma * * * as it is the province of the courts of the state to determine that question. But county officers and their deputies do not bear any official duty by virtue of their positions to enforce the * * * laws of the United States. And their mere

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27. The "irrebuttable" inference or presumption which the court's opinion raises ignores the many inferences and reasonable hypotheses consistent with innocence. Inherent in the court's "inference" that the conspirators agreed to import liquor is the *unsupported premise* that Tulsa liquor dealers were dependent upon the conspirators for their supply of liquor. Nothing could be farther from existing fact. The testimony of Bill Edwards completely refutes the basis for the court's "inference." See Footnote 14, *supra*, p. 12.

The farce of Oklahoma "prohibition" has received national attention in various periodicals. The "dry" State of Oklahoma is perhaps one of the "wettest" States in the Union. The availability and flow of liquor has never been a problem. It was so imported into Oklahoma prior to the 1936 conspiracy; it was so imported by innumerable persons wholly unconnected with the conspiracy during its brief existence; it has been so imported since termination of the abortive scheme; and in all likelihood, will continue to be imported unlawfully so long as Oklahoma remains "dry".

failure to enforce such laws or to prevent a conspiracy to violate them, without more, is not enough to support a conviction upon a charge of violating Section 37 of the Criminal Code. * * * *Weniger* v. *United States,* 9 Cir., 47 F. 2d 692; *Rossi* v. *United States,* 9 Cir., 49 F. 2d 1.

"* * * Viewed in the light most favorable to the Government, no substantial evidence was adduced to show that these appellants formed a *conspiracy* * * * *to violate the laws of the United States.* * * * Laying aside the question whether they acted together in *extorting money* from others *for protection against prosecution under the laws of the state* or otherwise participated in a concert of action to prevent the enforcement of such laws, there was no substantial evidence * * * that they formed or furthered an agreement * * * having for its object and purpose the violation of the laws of the United States." (Italics ours.)

The decision of the court below is in irreconcilable conflict with its prior holding in *Wilder,* and vastly extends federal jurisdiction. We respectfully submit that *Wilder* correctly states the limits of Federal intervention in State affairs.

The unlawful conspiracy of March 1956, as defined by the agreement of the conspirators, constituted no violation of Federal law and *conferred no jurisdiction* on the trial court. By its opinion, and the doctrine of "implied conspiracies" therein adopted, the court below usurps the jurisdiction of the courts of the State of Oklahoma and further encroaches upon the powers reserved to the States by the Tenth Amendment.

Fully in accord with the decision in *Wilder*, and irreconcilably in conflict with the decision of the court in the cause below, are the decisions of the United States Court of Appeals for the Fourth Circuit in *Walker* v. *United States*, 104 F. 2d 465; the decision of the Fifth Circuit in *Railton* v. *United States*, 127 F. 2d 691; and the decisions of the Ninth Circuit in *Weniger* v. *United States*, 47 F. 2d 692, and *Rossi* v. *United States*, 49 F. 2d 1.

This Court has viewed with disfavor "attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald* v. *United States*, 353 U. S. 391, 404, 77 S. Ct. 963, 974, 1 L. ed. 2d 931. In *Grunewald* and *Krulewitch*, this Court rejected efforts to extend the agreement of the conspirators by *implying* a subsidiary conspiracy of concealment.

Does not the basic philosophy of these cases require rejection of the implication by the court below of an overriding, implicit, unmanifested agreement and conspiracy to violate Federal law? May jurisdiction be extended or usurped by implied Federal conspiracies?

We think, as stated by the late Mr. Justice JACKSON in his landmark concurring opinion in *Krulewitch* (336 U. S. 440, 456-457, 69 S. Ct. 716, 724-725, 93 L. ed 593):

> "It is difficult to see any logical limit to the 'implied conspiracy,' • • •
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> • • • • • • • •
>
> "I do not see the slightest warrant for *judicially introducing a doctrine of implied crimes or constructive conspiracies.* It either adds a new crime or extends an

old one. * * * it is well and wisely settled that *there can be no judge-made offenses* against the United States and that every federal prosecution must be sustained by statutory authority. *No statute authorizes federal judges to imply, presume or construct a conspiracy* except as one may be found from evidence. * * * it is * * * fundamentally and irreconcilably at war with our presumption of innocence.

"* * * *We should disapprove the doctrine of implied or constructive crimes in its entirety and in every manifestation.* * * *" (Italics ours.)

This is the sole philosophy consistent with freedom!

3.

Fair and Impartial Trial.

Charged by indictment in a mass conspiracy trial for an unlawful conspiracy to import liquor into Oklahoma and to evade payment of Federal liquor dealer taxes, twenty defendants, including these fifteen petitioners, were subjected to a voluminous mass of testimony by some 123 witnesses in the lengthy 8 day trial, *at least 95%* of which pertained to separate, unrelated conspiracies, offenses, arrests, and other irrelevant, immaterial and prejudicial acts and transactions![28]

The testimony adduced is recorded in some 1400 pages in the original record. It is significant, however, that only a minute portion of the testimony adduced pertained to the single conspiracy finally submitted to the jury. Only *two witnesses* testified as to the existence of the March 1956 conspiracy and only four other witnesses testified to corroborate

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28. See Footnote 15, pp. 13-14, *supra*, for the major instances of prejudicial testimony adduced.

the testimony of Bill Edwards that "protection" payments were made to him!

Typical of the prejudicial testimony adduced was testimony pertaining to:

The separate, unrelated conspiracy of Boone, Carter and Graves for a "protection pay-off" in 1950-1952, four to six years prior to the submitted March 1956 conspiracy (R. 218-231, 233-236, 239-242, 242-248, 253-255, 379-380, 380-387, 573-578);

The prior conspiracies of Bill Edwards and defendant Gray, whose conviction was reversed on appeal, in the period 1953-1956 (R. 317-322);

The prior conspiracies of Epps and defendant Bulloch, who was acquitted upon motion for judgment of acquittal, in the years 1948 and 1953 (R. 164-177, 189, 197-204, 210-216, 231-233, 614-615);

The separate "pay-off" conspiracy involving Moore and petitioner Peterson during July-December 1956, subsequent to the abortive March 1956 conspiracy (R. 690-694, 700-701);

The wholly unrelated, subsequent "pay-off" conspiracy centering around Massey and petitioner Martin Edwards, which commenced in July, 1956 (R. 745-762, 765-771, 775-776, 707-712, 715-716);

Importation of liquor by innumerable persons in the years 1948, 1949, 1950, and early 1951, when the Federal Liquor Enforcement Act was inapplicable and it was *not unlawful* to import liquor into Oklahoma (R. 259-263, 299-304, 311-317);[29]

29. This testimony was stricken by the court and the jury admonished not to consider it. (R. 859)

Importation of liquor into Oklahoma in the years 1951-1956, prior to the submitted conspiracy (R. 304-306, 309-311, 317-324, 326-328);[30]

Payment or non-payment of Federal liquor dealer taxes in the years prior to March, 1956 (R. 401-413);[31]

Add to the cumulative impact of this overwhelming mass of prejudicial testimony the inflammatory and insidiously prejudicial testimony concerning prostitution, which was highlighted by a parade of some 8 prostitutes, a "madame," a panderer, a bail bondsman, and an attorney who had represented prostitutes for some 20 years, and blatant newspaper headlines for several days! (R. 624-670)

The trial court at all times recognized that the only charge of the indictment was a conspiracy to import liquor

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30. Though evidence solely of prior substantive offenses by some defendants, the trial court instructed the jury that it could consider the evidence of importation of liquor in the years 1951-1956 in determining an "intent" of the conspirators to conspire in 1956. (R. 957)

This is fundamental error. *Boyd* v. *United States*, 142 U. S. 450, 458, 12 S. Ct. 292, 295, 35 L. Ed. 1077; *Michelson* v. *United States*, 335 U. S. 469, 475-476, 69 S. Ct. 213, 218-219, 93 L. Ed. 168; *Helton* v. *United States*, 5 Cir., 221 F. 2d 338, 340-341; *Hartman* v. *United States*, 8 Cir., 215 F. 2d 386, 391-394; *United States* v. *James*, 2 Cir., 208 F. 2d 124, 125; *Lovely* v. *United States*, 4 Cir., 169 F. 2d 386, 388-389; *Railton* v. *United States*, 5 Cir., 127 F. 2d 691, 692-693; *Walker* v. *United States*, 4 Cir. 104 F. 2d 465; *Coulston* v. *United States*, 10 Cir., 51 F. 2d 178, 180-181; *Crowley* v. *United States*, 9 Cir., 8 F. 2d 118; 1 Wigmore, Evidence (3rd ed. 1940), sec. 194, pp. 646, 647, 650-652; 1 Wharton, Criminal Evidence (12th ed. 1955), sec. 248, p. 567.

31. The court also permitted the jury to consider this evidence in determining an "intent" to conspire.

It should be noted that on appeal the Tenth Circuit held that the evidence adduced was wholly insufficient to establish any agreement or conspiracy to evade payment of the Federal liquor dealer taxes and that the trial court erred in submitting that part of the conspiracy to the jury. (Opinion pp. 11, 12, 22, appendix, *infra*, pp. 52, 60)

and to evade payment of Federal taxes. On numerous occasions, the court stated that neither prostitution as such nor a conspiracy to exact tribute from prostitutes were violations of Federal law or even charged by the indictment![32] The court, however, nonetheless admitted the evidence over objection of the defendants!

Fully two days later, after the jury had heard the testimony of some 36 other witnesses, the trial court held that the evidence of prostitution had not been "connected up" with the charged conspiracy and admonished the jury not to consider it. (R. 867) However, motions of the defendants to strike the testimony and for mistrial were denied on the amazing ground that the evidence was not prejudicial because it was not "connected up" in any way with any of the defendants! (R. 832, 833-834, 864)

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32. The first ruling of the trial court came on objection of the defendants to the Government's *opening statement*. (R. 156) Similar rulings were made as to gambling, another uncharged offense as to which prejudicial evidence was adduced. (R. 166-167) Throughout the trial, prejudicial testimony was adduced and admitted over objection of the defendants, to be stricken later if not "connected up."

One of the early rulings by the court as to admissibility of evidence concerning prostitution and gambling was the following:

> "Mr. Page: If Your Honor please, come now the defendants and move that this testimony concerning prostitution and any gambling raid be stricken as having *no probative value to the issues* in this case.
>
> "The Court: Overruled. * * * I should say to the jury * * * however, because I anticipate that this same question will arise from time to time, that you should have in mind that *the charge made* in the indictment with which we are concerned in this case *has to do only with an alleged conspiracy pertaining to liquor*. That is, an alleged conspiracy to import liquor * * * in violation of federal law, and to sell both at wholesale and retail without paying the special tax as required by federal law. *The indictment does not contain any accusation or charge with reference to gambling, or any other vice;* and any testimony that you hear that pertains to gambling or any other vice— and I might mention the other thing I have in mind because I think we will get to that shortly too—and that is *prostitution*—any evidence presented in that connection can only be considered, if it is in some way connected up with the alleged conspiracy to violate the liquor law. * * *" (R. 437, 438; italics ours)

Can this mass of prejudice to which the jury was subjected throughout the eight-day trial be erased from the minds of the jurors by a single admonition of the trial court at the end of the trial to disregard it?

> "* * * The *naive assumpton* that prejudicial effects can be overcome by instructions to the jury, * * * all practicing lawyers know to be *unmitigated fiction.* * * *"
>
> *Krulewitch* v. *United States,* 336 U. S. 440, 453, 69 S. Ct. 716, 723, 93 L. ed. 593 (concurring opinion, Mr. Justice JACKSON; italics ours).

Is this not "substantial prejudice" and the denial of a fair and impartial trial within the test laid down by this Court in *Kotteakos* v. *United States,* 328 U. S. 750, 764-765, 66 S. Ct. 1239, 1247-1248, 90 L. ed. 1557?

> "* * * the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. *The crucial thing is the impact of the thing done wrong on the minds of other men,* not on one's own, in the total setting. * * *
>
> "This must take account of *what the error meant to them,* not singled out and standing alone, *but in relation to all else that happened.* And one must judge others' reactions not by his own, but with allowance for how others might react * * *. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.
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> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should

stand * * * *But if one cannot say, with fair assurance, after pondering all that happened* without stripping the erroneous action from the whole, *that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.* The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." (Italics ours.)

If *this* be not substantial prejudice, is not the judgment of the jury substantially swayed by the added impact of:

The erroneous submission to the jury of count II, which the appellate court held was wholly unsupported by the evidence and should not have been submitted;

The erroneous instruction that the jury could consider prior substantive offenses in determining the existence of an "intent" to conspire;

The erroneous instruction that Federal law is violated by failure to file Forms 52-A and 52-B, which offense was not charged, either as a substantive offense or as an object of the conspiracy, thereby injecting an uncharged offense for the jury to consider in determining guilt of the submitted conspiracy; and,

The erroneous submission of the special verdicts?

Manifestly, substantial rights have been affected and a fair and impartial trial has been denied!

Conclusion.

It is respectfully submitted that the discretion of this Court should be exercised in granting the writ of certiorari as prayed for in this petition.

No *single question* is here presented! No *mere conflict* of decisions in the courts of appeals is relied upon as the basis of review.

An important question of Federal criminal procedure has arisen in Federal conspiracy prosecutions which has perplexed and is perplexing appellate and trial courts, prosecutors, defendants and counsel:

What was the intent of Congress in providing a separate maximum punishment for conspiracies to commit misdemeanors?

How may this intent be effected?

How may or must the trial court determine the maximum punishment imposable?

How may or must the offense be charged and submitted?

May a special verdict be submitted?

May the defendant require submission of a general verdict by objection to utilization of special verdicts?

These are but some of the vital issues unsolved by statute, Rule, or decision of this Court. The hopeless confusion and irreconcilable conflict in the lower court decisions should call for an exercise by this Court of its power of supervision and of its function in declaring uniform Rules of criminal procedure.

There can, we respectfully submit, be no serious question that the dangers to individual rights created by the

lower court's doctrine of implied conspiracies also call for the exercise by this Court of its power of supervision.

> "* * * Few instruments of injustice can equal that of the implied or presumed or constructive crimes. The most odious of all oppressions are those which mask as justice."
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> *Krulewitch* v. *United States,* 336 U. S. 440, 457-458, 69 S. Ct. 716, 725, 93 L. ed. 593.

Equally vital to continued sound administration of justice is the necessity for review by this Court of the disregard of the lower court of *Kotteakos* v. *United States,* 328 U. S. 750, 66 S. Ct. 1239, 90 L. ed. 1557, and the sanctioning by the lower court as "fair and impartial" of a trial, and convictions had thereon, tainted by overwhelming prejudice, violative of fundamental Due Process.

Wherefore, petitioners pray that their petition be granted, that a writ of certiorari issue to the United States Court of Appeals for the Tenth Circuit, and that they be afforded such other relief as may be proper in the premises.

Respectfully submitted,

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APPENDIX.

OPINION.

(January 6, 1958.)

Irvine E. Ungerman, Tulsa, Oklahoma, (Charles A. Whitebook, Manuel Grabel, Maynard I. Ungerman, William Leiter, R. James Unruh, James F. Metzer, Tulsa, Oklahoma, and A. L. Shortridge, Joplin, Missouri, were with him on the brief) for Appellants.

B. Hayden Crawford, United States Attorney, (Russell H. Smith, First Assistant United States Attorney, John Morley, Assistant United States Attorney, and Hubert A. Marlow, Assistant United States Attorney, Northern District of Oklahoma, were with him on the brief) for Appellee.

Before BRATTON, Chief Judge, and PICKETT and LEWIS, Circuit Judges.

PICKETT, Circuit Judge.

The appellants were charged in a two count indictment with conspiring to violate the laws of the United States. The first count alleges that the appellants, with others, conspired to import intoxicating liquor into the dry state of Oklahoma in violation of 18 U. S. C. A. 1262. The second count charged a conspiracy by the defendants to carry on the business of wholesale and retail liquor dealers without paying the special tax required by 26 U. S. C. A. 5691. Each count set forth that the conspiracy continued from about January 1, 1948, to approximately February 21, 1957. At the conclusion of the trial the court found that the evidence

was insufficient to establish a conspiracy prior to March of 1956. Motions for judgments of acquittal for all the defendants except the appellants were sustained. The case was submitted to the jury limited to the question of whether a conspiracy existed in March of 1956 and thereafter. All appellants were found guilty on the first count and only the defendants T. Martin Edwards and John David Hood were found guilty on the second count. Each defendant was sentenced on the first count to be imprisoned for one year and to pay a fine of $1,000. T. Martin Edwards and Hood were sentenced to serve a term of one year on the second count, to run concurrently with the sentence received on the first count. All the defendants convicted have appealed.

One of the principal grounds for reversal is that the evidence does not establish the existence of a conspiracy to violate Federal laws. The Federal Statute makes it a crime to conspire to commit an offense against the United States. The offense is complete when two or more persons combine together to commit an offense against the United States and do any act to effect the object of the conspiracy. 18 U. S. C. A. 371; *O'Neal* v. *United States*, 10 Cir., 240 F. 2d 700. "In determining the question of the sufficiency of the evidence to support a verdict, the inferences to be drawn therefrom are viewed in the light most favorable to the prosecution." *O'Neal* v. *United States, supra; Seefeldt* v. *United States*, 10 Cir., 183 F. 2d 713; *Wilder* v. *United States*, 10 Cir., 100 F. 2d 177. The agreement need not be

in any particular form. By its nature it is seldom susceptible of direct proof. Ordinarily conspiracies can be established only by the acts and conduct of the conspirators and the inferences to be drawn therefrom. *Butler* v. *United States,* 10 Cir., 197 F. 2d 561. Generally convictions will be sustained if the circumstances, acts and conduct of the parties are of such character that the minds of reasonable men may conclude therefrom that an unlawful agreement exists. *O'Neal* v. *United States, supra; Heald* v. *United States,* 10 Cir., 175 F. 2d 878, cert. denied 338 U. S. 859; *Young* v. *United States,* 10 Cir., 168 F. 2d 242,[1] cert. denied 334 U. S. 859.

A summary of the evidence discloses that early in the year 1956 the defendant Jones was a candidate for election to the office of Police and Fire Commissioner for the City of Tulsa, Oklahoma. Sometime during the latter part of February or early in March, Charles Hirrlinger and the defendant McAfee met, at which time McAfee stated that he believed that he could work out a vice protection deal if they could get Jones elected, but it would cost four or five thousand dollars. Shortly thereafter, Hirrlinger and Mc-

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1. In the Young case, the court said:

"It is well to remember that in the very nature of things, unlawful conspiracies are seldom provable by direct and positive evidence. Ordinarily they must be established by circumstantial evidence, and 'it is sufficient if the circumstances, acts and conduct of the parties are of such character that the minds of reasonable men can conclude therefrom that an unlawful agreement exists.' *Garhart* v. *United States,* 10 Cir. 157 F. 2d 777, 781. See also *Wilder* v. *United States,* 10 Cir., 100 F. 2d 177. Nor is it essential that each conspirator participate in or have knowledge of all of the operations of the conspiracy. It is enough if a conspiracy is formed, and the several persons convicted knowingly contributed their efforts in furtherance of it. *Berenbeim* v. *United States,* 10 Cir., 164 F. 2d 679."

Afee met with Jones, and it was agreed that Hirrlinger would talk to Bill Edwards about raising the money. Following these meetings there were numerous conversations between the different individuals above named, and substantial sums of money were delivered to Jones. Bill Edwards was then, and had been for many years, one of the principal importers of intoxicating liquor into the City of Tulsa, substantially all of which was disposed of at wholesale. Sometime in March Bill Edwards, Hirrlinger and McAfee discussed in detail what the organization should be, including the division of the income received from the protection payoff.[2] A few days before the election on April 3, 1956, Bill Edwards, Hirrlinger and Jones met secretly. Jones stated that he intended to make some money if he won the election. The meeting was for the purpose of raising money immediately for the election expenses of Jones and to talk about an organization for the collection of money from those engaged in the liquor, gambling and prostitution business within the City of Tulsa after the election. At that time Jones was given $700.00. He shook hands with Bill Edwards and told him that if he were elected, Edwards would be in control of the liquor business in Tulsa. Jones suggested that he should meet in the future only with Hirrlinger and that it was not a good idea for all of them to get together too often. Prior to the election Edwards received $200.00 from the defendant Lee Johnson, and $900.00 from three Massey

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2. Bill Edwards testified that it was decided that, after expense, Jones was to receive 50 per cent of the income and the remaining 50 per cent was to be divided equally among the three. The expenses were to include a $500 per month payment to Livingston, Tulsa Chief of Police, and $200 per month to each member of the police vice squad.

brothers, which was delivered to Jones. Johnson and the Massey brothers were liquor dealers, and it was understood that if Jones were elected, they were to be given credit for these payments on any exactions which were required thereafter.

Jones was elected, and took office on May 8, 1956. In the latter part of May, Bill Edwards and Hirrlinger met with the defendants Jones, Livingston, Gott, and McAfee, at Hirrlinger's home near Tulsa for the purpose of completing the control and payoff arrangements. Livingston had been appointed Chief of Police and Gott was a long-time head of the Tulsa police vice squad. McAfee was a billiard hall operator in Tulsa. At this meeting specific arrangements were made to require payments from persons who were selling intoxicating liquor, engaging in gambling or prostitution operations. Livingston was the spokesman at this meeting and the division of the money to be realized was drastically changed from the original understanding. The principal difference was a division of 20% each to Livingston and officer Gott, 40% to Jones, and a reduction to 10% for Bill Edwards, Hirrlinger and McAfee together. Bill Edwards was to take charge of the liquor operations, McAfee the gambling, and Hirrlinger the prostitution activities. As to the payments to be exacted from the liquor dealers, Bill Edwards testified that he was to contact the bootleggers and let them know that he was in a position to help them in their business if they would cooperate. The cooperation included the payment of $100.00 per month. Those operating places known as "walk-ins" were to pay

a minimum of $250.00 per month. They were told that those who did not make the payments would be reported to the police vice squad for raiding and arrest. The vice squad would be given the information regarding those who paid, including a complete description of their cars. They would not be molested by the vice squad, but given a free range. The liquor dealers were assured that price cutting activities were not to be tolerated. It was understood that if the required payments were not made, the vice squad should take necessary and appropriate action to put them out of business.

Early in June, 1956, Bill Edwards, Hirrlinger, Jones, Livingston, Gott and McAfee met again. At this meeting Livingston, who seemed to assume the leadership in the scheme, insisted that Bill Edwards' brother Martin be allowed in on the deal. There was bitter feeling between Bill Edwards and his brother, who was also an importer of large quantities of liquor into Tulsa. Bill objected strenuously, even to the extent of saying that if his brother was in, he was out. The question was put to a vote, and Bill Edwards was the only one who voted to keep Martin out. No immediate action was taken to include Martin. There were numerous meetings of different individuals of this group thereafter, from which emerged the contemplated systematic plan for obtaining money from those in the liquor business, and other businesses, in exchange for protection to be furnished them in their illegal activities. During all this time Bill Edwards had authority to determine which liquor dealers would be permitted to buy protection and

which would not. He exercised his authority city-wide. He was in posittion to give instructions directly to members of the police vice squad or through Jack Gott. They followed instructions or were removed. He did not require the liquor dealers to buy liquor from him, but he testified that under the arrangement he had all the business he could handle and didn't have room for any additional. He also had the power to cut a liquor dealer off if he refused to trade with him. During this time, for the purpose of carrying out the agreements, Bill Edwards made substantial collections from different liquor dealers. If anyone who had been paying was raided, he was to get his money and liquor back. When liquor dealers felt they were not getting the promised protection and that the non-paying dealers were not being properly taken care of by the vice squad, they complained to Bill Edwards. All of the collections, including those from gambling and prostitution, were pooled, and 90% of it was turned over to Gott for distribution under the arrangement.

During this period the wholesale liquor business of Bill Edwards flourished. He made almost daily purchases of large amounts of liquor from the defendant Gray, who operated wholesale liquor stores in Missouri near the Oklahoma state line. Most of these purchases were transported to Tulsa in automobiles with special equipment on them. In July, 1956 Livingston prevailed and Bill Edwards was replaced by his brother Martin, who took charge of the liquor business with little change in the existing procedure.

Martin made the collections personally or by a designated agent. About the same time, Hirrlinger quit the organization.

The record so clearly establishes a conspiracy and acts to effectuate it, that further discussion is unnecessary. We also think that the evidence shows that the combination from its inception contemplated the unlawful importation of intoxicating liquor into Oklahoma. Bill Edwards, who was in charge of the liquor end of the deal, had been for many years one of the principal importers of intoxicating liquor into Tulsa. When he was ousted, at the insistence of Livingston, his replacement was also a known importer of liquor. Without imported liquors, the combine would have had no liquor business to control in Tulsa.

As to the second count, there is no evidence in the record from which it may be inferred that the failure to pay the statutory tax for carrying on the business of wholesale or retail liquor dealer had anything to do with the conspiracy or was even considered at any time by the conspirators. There was evidence of substantive violations, but none of conspiracy. The second count should not have been submitted to the jury as to any of the defendants.

The appellants contend that, considering the evidence in the light most favorable to the prosecution, all that is shown is a conspiracy to protect bootleggers from raids and prosecution by city officials, which brings the case within the rule of *Wilder* v. *United States, supra*. In the *Wilder* case it was charged that the conspirators agreed to engage

in the business of distilling whiskey at various places without furnishing the bond required by Federal law, or paying the required tax. The defendants who were state officers, exacted payments from the still operators for being allowed to continue their business. Referring to the conduct of the officers, the court said: "their mere failure to enforce such laws or to prevent a conspiracy to violate them, without more, is not enough to support a conviction of a charge of violating * * *" the Federal Conspiracy Statute. The court continued that it was "necessary to prove that they consented in some affirmative way to become a party to the concert of action." Therein lies the distinction between the *Wilder* case and this case. Here it was not a matter of inaction on the part of the city officials Jones, Livingston and Gott. They were the original conspirators, along with Bill Edwards, Hirrlinger and McAfee, in developing and carrying out this sordid arrangement which included taking of money from dealers in intoxicating liquor in Tulsa, who necessarily were to sell liquor imported into Oklahoma. The fact that Jones, Livingston and Gott were city officials, sworn to enforce city ordinances, does not prevent them from conspiring to violate the laws of the United States.[3]

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3. The trial court's instruction on this subject correctly states the law. It is as follows:

"You are instructed that the police officers of the City of Tulsa, Oklahoma, are not under any duty by virtue of their positions to enforce the Federal Liquor Importation Act or the Internal Revenue laws of the United States. The mere failure of police officers of the City of Tulsa to make arrests or raids for the purpose of aiding in the enforcement of Federal laws pertaining to the transportation and sale of liquor would not be sufficient to prove a conspiracy upon the part of such officers to violate those laws. But, if such police officers enter into an agreement to aid and assist others in carrying on the liquor business and knowingly and intentionally cooperate with others in the importation of liquor into Oklahoma in violation of Federal law, or aid and assist others in carrying on the business of either a wholesale or a retail liquor dealer, and wilfully failing to pay the special tax as required by Federal law, then such police officers do commit an offense against the United States."

The inference is inescapable that it was understood that a substantial portion of the liquor disposed of in Tulsa was to be imported by one of the conspirators, who was authorized to designate the local retail liquor dealers who were to be protected. The case is more like *Briggs* v. *United States,* 10 Cir., 176 F. 2d 317, cert. denied, 338 U. S. 861, rehearing denied 338 U. S. 882; and *Parnell* v. *United States,* 10 Cir., 64 F. 2d 324, than *Wilder.*

As to the other defendants, the question remains whether they, knowing of the conspiracy, entered into it. A person does not become liable as a conspirator unless he knows of the existence of the conspiracy, agrees to become a party, and with that knowledge commits some act in furtherance thereof. *United States* v. *Falcone,* 311 U. S. 205; *Laska* v. *United States,* 10 Cir., 82 F. 2d 672, cert. denied 298 U. S. 689; *Skelly* v. *United States,* 10 Cir., 76 F. 2d 483, cert. denied 295 U. S. 757; *Booth* v. *United States,* 10 Cir., 57 F. 2d 192. This knowledge and participation may be inferred from the circumstances, acts and conduct of the parties. The evidence is quite clear and without dispute that T. Martin Edwards entered into the conspiracy with full knowledge thereof, made the collections which had theretofore been made by his brother, and also continued his business as an importer of intoxicating liquor which was to be disposed of at wholesale, principally to those who were paying for protection.

The defendants Jackson, Cole, Harp, Peterson and Stephens were police officers who were assigned to the vice squad after the formation of the scheme by the original

conspirators. The initial plan was that these men were to receive $200.00 per month for their participating in the conspiracy. There was some evidence that they were to get preference in connection with their duties, but there is no direct evidence that any payments of money were made to them or that the other benefits were received. The record is, however, replete with evidence from which it can be inferred that each of them knew of the scheme and assisted in carrying out its purpose. They protected those who paid, and raided the nonconformists when directed to do so by Bill Edwards, T. Martin Edwards or Gott.

The defendants Oakley, Griffing, Johnson, Rucker and Hood were liquor dealers in Tulsa. They were informed of the central combination to control the dissemination of liquor in the city and what was required of them if they desired to continue in business. Each accepted the terms and became participants. In discussing a similar situation, in *Parnell* v. *United States, supra,* this Court said:

> "The trial jury was justified in finding the conspiracy was formed as charged. It began by a deliberate agreement. The exactions put on the several liquor violators resulted in nothing more than an entry by them into the conspiracy. In other words, they might operate, if they joined in the corrupt liquor scheme. The evidence centers around the still on the Tidwell farm, and it was within the province of the jury to find that transaction was an overt act in furtherance of the conspiracy. Bellah doubtless knew it was on foot when he applied for the privilege of locating a still on that place and paid the protection money for it. There was no separate plan to conspire with different groups. The

law violators when informed of the opportunity contributed and became parties to the liquor program in the county."

The defendant Gray was an operator of several liquor stores in Missouri. Before and after the scheme agreed upon by the original six conspirators, he sold large quantities of liquor to Bill Edwards and others, which he knew was to be taken into the dry state of Oklahoma. During the time that the conspiracy was in effect, but after Bill Edwards had been ousted, Gray went to Tulsa to confer with Bill Edwards, who had threatened to discontinue purchases from him. So far as the evidence shows, this trip was solely for the purpose of trying to prevent a discontinuance of a business relationship of long standing. The evidence may be sufficient to show that he aided and abetted the importation of intoxicating liquor into Oklahoma, or even conspired with Bill Edwards and others to do so, but there is not a scintilla of evidence that he knew of the conspiracy charged in the indictment and consented to become a party, or knowingly did any act to accomplish its purpose. In *Van Huss* v. *United States*, 197 F. 2d 120, we quoted from *Direct Sales Co.* v. *United States*, 319 U. S. 703, 709, as follows: "one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use goods illegally." Cf. *Ritter* v. *United States*, 10 Cir., 230 F. 2d 324. Gray's motion for acquittal should have been granted. See *Bacon* v. *United States*, 10 Cir., 127 F. 2d 985; *Marcante* v. *United States*, 10 Cir., 49 F. 2d 156.

The defendants charge that the United States Attorney was guilty of willful misconduct and gross disregard of his duty, as a representative of the United States, by using methods calculated to deprive these defendants of a fair and impartial trial. This accusation is based upon the claim that many of the witnesses called testified to activities of some of the defendants in relation to prostitution, gambling, graft and corruption in Tulsa, which had no connection with the charge, and that the sole purpose of such evidence was to prejudice the jury against the defendants. We find these intemperate accusations wholly without justification. There is nothing in the record to indicate that the District Attorney acted deliberately and in bad faith. The evidence is without conflict that the conspiracy not only included the control of the sale of intoxicating liquor in Tulsa, but also the control of prostitution and gambling. The income which the scheme derived from each source went into a common pot which was divided according to the agreement.

It is elementary that the evidence of other offenses is not admissible in the trial of a criminal offense. This rule is not applicable if the evidence is introduced to prove intent or to show a course of conduct, or tends to prove the crime charged. *Baish* v. *United States,* 10 Cir., 90 F. 2d 988; *Minner* v. *United States,* 10 Cir., 57 F. 2d 506; *Butler* v. *United States,* 10 Cir., 53 F. 2d 800. Control of prostitution and gambling was part of the conspiracy; it was so interwoven with the liquor control established by the conspirators that it was impossible to separate them, but the trial court was extremely careful throughout the entire

proceeding in advising the jury as to what extent such evidence should be considered by it. Consequently, no error resulted from the reference by different witnesses.[4] *Holt* v. *United States*,10 Cir., 94 F. 2d 90; *Metzler* v. *United States*, 10 Cir., 64 F. 2d 203. We are satisfied from an examination of this entire record that the court's admonitions during the trial were sufficient to prevent any prejudice from the admission of evidence which was later excluded or not properly connected with the conspiracy.

It is contended that as there was only one conspiracy, it was error to indict the defendants on two counts and thereby to submit the case to the jury as though there were two offenses. It is conceded that there was only one conspiracy, but the District Attorney argues that if the unlawful agreement contemplates the commission of more than one offense against the United States, it is proper to plead each offense in a separate count. In view of our conclusion as to the second count, we need not reach the question as

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4. Typical of such care by the trial court is the following statement to the jury:

"* * * I think perhaps I should say to the jury at this point, however, because I anticipate that this same question will arise from time to time, that you should have in mind that the charge in the indictment with which we are concerned in this case has to do only with an alleged conspiracy pertaining to liquor. That is, an alleged conspiracy to import liquor into the State of Oklahoma in violation of federal law, and to sell both at wholesale and retail without paying the special tax as required by federal law. The indictment does not contain any accusation or any charge with reference to gambling, or any other vice; and any testimony that you hear that pertains to gambling or any other vice—and I might mention the other thing I have in mind because I think we will get to that shortly—and that is prostitution—any evidence presented in that connection can only be considered, if it is in some way connected up with the alleged conspiracy to violate the liquor law. Evidence pertaining to gambling and other forms of vice is not to be considered only except and in so far as it may hereafter be connected up and shown to have some relation to the charge of the conspiracy to violate the liquor law."

to whether a single conspiracy to commit acts in violation of several penal statutes may be pleaded in separate counts and punished as one or several conspiracies. See *Braverman* v. *United States,* 317 U. S. 49;[5] *Williams* v. *United States,* 5 Cir., 238 F. 2d 215, cert. denied 352 U. S. 1024.

We find no merit in the assignment of error that the court did not adequately instruct the jury on the basic elements of a conspiracy. The jury was told that the elements of a conspiracy were the willful conspiring together of two or more persons to commit offenses against the United States; that the offense was complete if it appeared from the evidence that any one of the overt acts alleged in the indictment was committed for the purpose of effecting the objects of the conspiracy. We have considered the instructions as a whole, and they cover the applicable law of conspiracy. The duty of the trial court is to instruct on the general principles of the law of the case. It is not required to include in its instructions what is not the law of the case nor to give instructions "in the language offered by the litigants or to outline all possible factual situations which

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5. In the Braverman case the question was whether a single conspiracy to commit acts in violation of several penal statutes should be punished as one or several conspiracies. The indictment was in seven counts. It was held that the precise nature and extent of the conspiracy must be determined by the agreement which embraces and defines its objects. The one agreement cannot be taken to be several agreements. The court did not criticize the indictment, but held that the sentence could be for one offense, and returned the case for resentencing. It appears quite clear that the indictment in the case at bar contained more than one count because some of the objects of the conspiracy constitute felonies and other misdemeanors. The sentences of all appellants are for misdemeanors only.

would fail to show one's connection with a conspiracy." *Butler* v. *United States,* 10 Cir., *supra,* p. 564. See also *Holt* v. *United States,* 218 U. S. 245.

We have reviewed this voluminous record in detail and find that the trial court conducted a rather difficult case with extreme care to protect all of the rights of the defendants. We find no error affecting any substantial rights of the defendants except as to T. Martin Edwards, John David Hood, and Don T. Gray.

The judgment is affirmed as to all defendants on the first count except the defendant Gray; judgment is reversed as to the defendant Gray and as to the defendants T. Martin Edwards and John David Hood on the second count only.

Judgment.

First Day, January Term, Monday, January 6th 1958.

Before Honorable Sam G. Bratton, Chief Judge, and Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

These causes came on to be heard on the transcript of record from the United States District Court for the Northern District of Oklahoma and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments and sentences of the said district court are affirmed as to all the defendants on the first count except the defendant, Don Gray; and the judgments and sentences are reversed as to the defendant, Don Gray, and as to the defendants, T. Martin Edwards and John David Hood, on the second count only.

It is further ordered by this court that the defendants except the defendant, Don Gray, surrender themselves to the custody of the United States Marshal for the Northern District of Oklahoma in execution of the judgments and sentences imposed upon them, within ten days from and after the date of the filing of the mandate of this court in said district court.

Constitutional and Statutory Provisions Involved:

Amendment V, The Constitution of The United States of America (Constitution of the United States of America, Revised and Annotated, 1952, Legislative Reference Service, Library of Congress, p. 40):

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use without just compensation." (Italics ours.)

Amendment VI, The Constitution of the United States of America (Constitution of United States of America, Revised and Annotated, 1952, Legislative Reference Service, Library of Congress, p. 41):

> "*In all criminal prosecutions, the accused shall*

enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, *and to be informed of the nature and cause of the accusation;* to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." (Italics ours.)

Amendment X, The Constitution of The United States of America (Constitution of the United States of America, Revised and Annotated, 1952 Legislative Reference Service, Library of Congress, p. 41):

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Title 18, United States Code, Section 371 (U. S. C., 1952 Ed., Vol. 2, p. 2354):

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Title 18, United States Code, Section 1262 (U. S. C., 1952 Ed., Vol. 2, p. 2428):

"Whoever imports, brings, or transports any intoxicating liquor into any State, Territory, District, or Possession in which all sales, except for scientific, sacramental, medicinal, or mechanical purposes, of intoxicating liquor containing more than 4 per centum of alcohol by volume or 3.2 per centum of alcohol by weight are prohibited, otherwise than in the course of continuous interstate transportation through such State, Territory, District, or Possession or attempts so to do, or assists in so doing,

"Shall (1) If such liquor is not accompanied by such permits, or licenses therefor as may be required by the laws of such State, Territory, District, or Possession or (2) if all importation, bringing, or transportation of intoxicating liquor into such State, Territory, District, or Possession is prohibited by the laws thereof, be fined not more than $1,000 or imprisoned not more than one year, or both.

"In the enforcement of this section, the definition of intoxicating liquor contained in the laws of the respective States, Territories, Districts, or Possessions shall be applied, but only to the extent that sales of such intoxicating liquor (except for scientific, sacramental, medicinal, and mechanical purposes) are prohibited therein."

Title 26, United States Code, Section 5691, Internal Revenue Code of 1954, Section 5691 (U. S. C., 1952 Ed., Supp. IV, p. 1884):

"Any person who shall carry on the business of a brewer, rectifier, wholesale dealer in liquors, retail dealer in liquors, wholesale dealer in beer, retail dealer

in beer, or manufacturer of stills, and willfully fails to pay the special tax as required by law, shall, for every such offense, be fined not more than $5,000, and imprisoned not more than 2 years. All distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in any building, room, yard, or enclosure connected therewith and used with or constituting a part of the premises, shall be forfeited to the United States."

Instructions of the Trial Court (R. 949-952, 952-958):

"*The indictment* returned by the grand jury in this case *consists of two counts.* In the first count the charge is made that the defendants, from on or about January 1, 1948, until on or about February 21, 1957 * * * unlawfully, wilfully, and knowingly conspired and agreed with each other and with twenty-one other named persons not on trial, and other persons whose names were unknown to the grand jury, to commit offenses against the United States by wilfully importing intoxicating liquors into the State of Oklahoma.

"It is further charged that the defendants committed some thirty overt acts, to effect the objects and purposes of the conspiracy, * * *

"Now *Count 2 contains essentially the same charge* of an unlawful conspiracy entered into by the defendants and others, except that it is alleged that the purpose of the conspiracy was to commit offenses against the United States by carrying on the business of wholesale and retail liquor dealers and wilfully failing to pay the special taxes required by the Internal Revenue laws

of the United States. It is further asserted in Count 2 that the same thirty overt acts described *** in Count 1 were committed by the defendants in pursuance of the conspiracy and to carry out the objects and purposes thereof.

"*While the indictment is separated into two counts, it alleges only one conspiracy* to commit offenses against the United States. Count 1 charging that *it was part of the conspiracy* that the defendants would wilfully import intoxicating liquors into Oklahoma, and Count 2 charging that *it was part of the conspiracy* that defendants would engage in the business of wholesale and retail liquor dealers, and wilfully failed to pay the special taxes required by the Federal law.

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"* * * In many respects, the matters involved in the two counts of the indictment are the same. This is a matter for the Court to consider in fixing the punishment in the event there should be a verdict of guilty, but it is not for the jury to consider in determining guilt or innocence.

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"As you have been heretofore advised by the Court, the evidence presented by the Government is not deemed to be sufficient to meet the required degree of proof that the defendants, or any of them, entered into the alleged conspiracy on or about January 1, 1948. The evidence does not tend to prove the existence of the alleged conspiracy until about March 1956.

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"If you find from the evidence by the required degree of proof that *the conspiracy alleged in Count 1* was wilfully entered into by the defendants on or about

March 1956, and that any of the defendants committed any one or more of the overt acts alleged in the indictment in furtherance of the objects of the conspiracy, and after the inception thereof, then you should find all defendants who were members of *the* conspiracy *guilty as charged in Count 1* of the indictment.

"If you find from the evidence by the required degree of proof that *the conspiracy alleged in Count 2* was wilfully entered into by the defendants on or about March 1956, and that any of the defendants committed any one or more of the overt acts alleged in the indictment in furtherance of the conspiracy, and after the inception thereof, then you should find all defendants who were members of *the* conspiracy *guilty as charged in Count 2* of the indictment.

"Any person who imports * * * any intoxicating liquor into the State of Oklahoma otherwise than in the course of continuous interstate transportation through the state, or attempts so to do, or assists in so doing, commits an offense against the United States.

"You have been repeatedly * * * advised * * * that this law was not in effect during an approximate four-year period from April 1947 to April 5, 1951.

"One who engages in the business of a wholesale liquor dealer is required by Federal law to pay a special tax. *A wholesale dealer is required to file monthly what is known as a form 52-A,* showing whom he purchased liquor from, *and a form 52-B,* showing the names of the persons to whom he sold liquor in wholesale quantities during the previous month.

* * * * * * * *

"The evidence presented by the Government—now I come to the exception with reference to this evidence, in the record, *prior to March 1956*: The evidence presented by the Government pertaining to the *importa-*

tion of liquor from Missouri into Oklahoma *during the period from April 5, 1951 to on or about March 1956,* the date upon which the defendants are charged with having entered into the unlawful conspiracy, *and the evidence pertaining to the carrying on of a liquor business* by some of the defendants during the same period, *and wilfully failing to pay the special tax* required by Federal law, *may properly be considered by you* but only for a limited purpose. *It may be considered* only in connection with the question of *an intent* of the defendants in determining whether the defendants intentionally and wilfully *conspired* to commit the offenses against the United States *during the period from about March 1956 to on or about February 21st, 1957.*

"You are instructed that the police officers of the City of Tulsa, Oklahoma, are not under any duty by virtue of their positions to enforce the Federal Liquor Importation Act or the Internal Revenue laws of the United States. The mere failure of police officers of the City of Tulsa to make arrests or raids for the purpose of aiding in the enforcement of Federal laws pertaining to the transportation and sale of liquor would not be sufficient to prove a conspiracy upon the part of such officers to violate those laws. But, if such police officers enter into an agreement to aid and assist others *in carrying on the liquor business* and knowingly and intentionally cooperate with others in the importation of liquor into Oklahoma in violation of Federal law, or aid and assist others in carrying on the business of either a wholesale or a retail liquor dealer, and wilfully failing to pay the special tax as required by Federal law, then such police officers do commit an offense against the United States.

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"* * * As to each defendant on trial you may find him *guilty on both counts* of the indictment, *not guilty on both counts* of the indictment, *or guilty on one count and not guilty on the other count of the indictment.*" (Italics ours.)

Additional Instructions of the Trial Court.

(Upon request of the Jury after one hour and twenty-three minutes of deliberations, R. 969-971):

"The Court: I think * * * I can make it a little clearer. * * *

"I told you in the instructions that *there is only one conspiracy* or one alleged conspiracy involved in the case. *But it is divided into two counts* and I think I might very well explain the reason for that * * *.

"The *first count* charges that it was the *object* of the conspiracy that the defendants would violate the Federal law pertaining to * * * *importation* of intoxicating liquor into the State of Oklahoma. *Then the second count charges the same conspiracy* but that *a part of the conspiracy* was to also violate the Federal law pertaining to the requirement that persons who are engaged in the business of wholesale and (retail) liquor dealers must pay a special tax, the charge being that the defendants *as a part of the conspiracy, and as an object of the conspiracy* intended to *wilfully fail to pay the special tax* required of wholesale and retail liquor dealers.

"Now, no doubt it has occurred to you, *why divide it into two counts if it is only one conspiracy?* The reason for it is this: The Federal Act which prohibits * * * *importation* of liquor into the State of Oklahoma under certain circumstances *is what is known as a misdemeanor.* The Federal law with reference to *wilfully failing*

to pay the special tax required of a retail or a wholesale liquor dealer *is what is known as a felony.* So that the penalty—the *maximum penalty* that may be imposed under the Federal law *for a conspiracy to violate the Federal law which is a misdemeanor is less than the penalty* that may be imposed *where there is a conspiracy to commit an offense by violating a Federal law which is a felony.*

"Now, then *if we submitted this case on only one count* to violate both the misdemeanor and the felony statute *and there should be a verdict of guilty* as to any one defendant *there would be no way of knowing whether he was found guilty of the conspiring to violate the statute which was a misdemeanor or guilty of violating the statute which is a felony, or whether he is guilty of violating both.* So in order that the verdict will reflect the conclusion reached by the jury with respect to the alleged conspiracy to violate particular Federal statutes it is *divided* into two counts. *One conspiracy, but as to the first count it is alleged that the object is to violate the misdemeanor statute, whereas in the second count it is alleged that the object*—one of the objects *was to violate the felony statute.*

* * * * * * * *

"An offense that is known as a *misdemeanor* is one that is—where the maximum punishment provided by law does not exceed *one year.* And if the punishment provided by law for the commission of a particular offense provides for a maximum penalty that may be imposed of in excess of a year then it is known as a felony. So, to be specific, the maximum penalty that may be imposed for a conspiracy to violate the transportation statute is twelve months or a year, * * * and I believe $1,000 fine.

* * * * * * * *

"The Court: One year and $1,000 fine, whereas a conspiracy to violate the statute with reference to wilful failure to pay the tax, the special tax on wholesale and retail liquor dealers calls for a penalty in excess of a year * * *." (Italics ours.)

Form of Verdict Submitted as to Each Defendant (R. 57):

"We, the Jury, find the defendant Jay L. Jones is ....., as charged in the first count of the indictment.

"We, further find the defendant Jay L. Jones ....., as charged in the second count of the indictment.

....,

Foreman."